JUN 13 1953
HAROLD B. WILLEY,

No. [redacted]80

In the

Supreme Court of the United States

OCTOBER TERM, 1953

MRS. MARILYN CAGLE, Individually, and as Guardian for DANNY RAY CAGLE, a Minor,

Petitioner,

v.

GEORGE F. MCQUEEN and ART STOUT, Individually, and as MCQUEEN & STOUT, and GULF OIL CORPORATION,

Respondents.

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI

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WARLICK LAW PRINTING CO. - LAW BRIEF PRINTING - DALLAS - HARWOOD 9350

INDEX

Subject-Matter

	Pages
Opening Remarks of Counsel	1-2
Points Against the Petition:	
Point One: The Circuit Court of Appeals and the Trial Court properly determined that the affidavit of the juror, Danielson, did not reflect bias or prejudice against petitioner's suit and that the jury verdict and judgment based thereon was not to be properly attacked	3-9
Point Two: The cases cited by petitioner are not in conflict with the Circuit Court of Appeals' opinion here attacked	9-12
Prayer	12

Authorities

	Pages
Allmon v. Texas Elec. Serv. Company, 242 S. W. 2d 806	5
Anderson v. Todd Ship Yard, 63 F. S. 229	7
El Paso Electric Co. v. Gambrell, 292 S. W. 2d 577	11
Fitch v. Southern Pacific Company, 149 Cal. 310, 86 Pac. 710	9
Green v. United States, 19 Fed. 2d 93	7
Kelly v. Gulf Oil Corporation, 28 F. S. 205 (confirmed, 90 L. Ed. 1575)	7
Kennard v. Kennard, 26 S. W. 2d 336	10, 11
McDonald v. Pless, 238 U. S. 264, 35 S. W. 783, 59 L. Ed. 1300	3, 11
Morrow v. Flores, 225 S. W. 2d 621	6
Murphy v. State, 141 S. W. 2d 634	6
Quill v. Southern Pacific Company, 140 Cal. 263, 73 Pac. 991	9
Revised Civil Statutes of Texas, 1925, Art. 2134, Sub-section 4	4, 8
Rhodes v. E. P. & S. W. Ry. Co., 248 S. W. 1064	9
Smith v. Allbright, 279 S. W. 852, (Reversed, 5 S. W. 2d 970)	4, 9
Texas Employers' Ins. Association v. Wade, 197 S. W. 2d 203	9, 10
Texas Mutual Life Insurance Association v. Morris, 55 S. W. 2d 146	11
United States v. Dennis, 183 Fed. 2d 201	7

No. 811

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May It Please the Court:

Petitioner, in the trial court, affixed to her Amended Motion for New Trial the affidavit of the juror, Danielson, which stated that: (1) in the hope that he might be excused from jury duty, for business reasons, he had inquired of a lawyer friend in his home town as to the probabilities of obtaining an excuse from the jury service because of his plans to shear his sheep; (2) in the course of his conversation with his lawyer friend, who was in no way connected with the suit, he had stated a belief that he would not be

accepted as a juror in any case because he had heard that the Trial Court was being used for a "sort of racket which he did not approve of"; his exact statement, as reflected in the record was as follows:

> "I then stated to him, in substance, that I had heard something about a lawyer who had most of the damage suit cases in that court, and from what I had heard I had concluded that he was using the court for a sort of racket and that for that reason I probably would not be accepted as a juror in any case that this lawyer was trying. I do not now recall that I knew this lawyer's name, at that time, to whom I referred; but I now know that it was John Watts." (R., p. 288.)

The juror's affidavit concluded with the statement that after being selected as a juror he listened carefully to the evidence and the court's charge, and rendered what he considered to be a fair verdict and what he had heard about appellant's counsel did not effect his decision.

The United States Circuit Court of Appeals, in passing upon the point now presented to this court, in foot note 4 of the opinion, cited cases which indicated that the court doubted the affidavit of the juror was to be considered for any purpose and then passed upon the point now being presented as follows:

> "Assuming the admissibility of the affidavit, it does not show that Mr. Danielson was incompetent to serve as a juror nor does it disclose anything improper on his part in determining the fact issues which were submitted for jury determination." (200 Fed. 2d 186, ex., p. 189.)

POINT ONE

The Circuit Court of Appeals and the Trial Court properly determined that the affidavit of the juror, Danielson, did not reflect bias or prejudice against petitioner's suit and that the jury verdict and judgment based thereon was not to be properly attacked.

ARGUMENT IN SUPPORT OF POINT ONE

Petitioner seeks to impeach the jury's verdict by use of an affidavit of a juror who served in the case. There is nothing in the affidavit of Mr. Danielson to indicate any improper method on his part of determining the fact issues which were submitted for jury determination in this case. True, before coming to court, the juror had expressed disapproval for the use of a United States District Court "for a sort of racket" and for that reason, anticipated he would not be selected as a trial juror but this statement was made days before court convened.

A losing party cannot use the testimony of a juror to impeach a verdict. *McDonald v. Pless, 238 U. S. 264, 35 S. W. 783, 59 L. Ed. 1300.*

> "*A losing party may not*, in any type of case, *explore a juror's mind for the purpose of demonstrating that his vote resulted from* a misconception of the evidence or a misunderstanding of the charge or from *prejudice.* If the juror reached a conclusion on evidence presented for his consideration, his conclusion cannot be dissected. For such a purpose, no evidence is competent, be it that a juror or an outsider to whom the juror disclosed his inmost thoughts. Proof of such a fact is excluded for at least two reasons: first, because there

> would be no end to litigation if verdicts could be set aside because one juror did not correctly understand the law or accurately weigh the evidence; second, the proof of his mental process is locked in the breast of the juror, and is not capable of refutation or corroboration." Southern Pac. Co. v. Klinge, 65 Fed. 2d 85, ex., p. 88. (Emphasis added.)

Assuming the admissibility of the affidavit—it is the contention of the petitioner herein that the affidavit of the juror shows that the juror was biased to such an extent as to disqualify him in accordance with the rule laid down in *Article 2134, Sub-section 4, Revised Civil Statutes of Texas, 1925*, which provides:

> "that any person who has a bias or prejudice in favor of or against either of the *Parties* is disqualified to serve as a juror in the case."

Petitioner cites the case of *Smith v. Allbright, 279 S. W. 852*, opinion by the Court of Civil Appeals of Texas. This case was finally passed upon and decided by the Commission of Appeals on May 9, 1928, and is reported in *5 S. W. 2d 970*. In the opinion by the Commission of Appeals for the Supreme Court of Texas, *5 S. W. 2d 970*, it is set out that one of the parties sought to set aside the verdict of the jury and the judgment of the court because of bias on the part of one of the jurors. While the jury was out, and during its deliberations, one of the jurors stated that he was acquainted with one of the parties, and had known him for some time, and that he knew the man well enough to know that the man was doing what he thought was right when he bought some property, and that he would

not have bought the property if he had not thought the title was clear. He indicated that he was very much in favor of his friend, and he kept up such an appeal, throughout the deliberations of the jury. It was brought out by the court that the juror did not render a verdict in favor of his friend, simply because he knew him and he was a friend. The Commission of Appeals, in passing upon this question, held that the belief of the juror in the respect indicated was only an opinion and in order to be sufficient to disqualify the juror, it would have to be necessary to show that such opinion was calculated to influence the juror in returning a verdict in the case, and if the juror had testified that notwithstanding such an opinion, he could render a fair and impartial verdict, based alone upon the law and the evidence, he would have been legally acceptable as a juror; the mere fact that a juror knows or is a neighbor to or an intimate acquaintance of, or on friendly relations with the parties to a suit is not sufficient basis for disqualification, or ordinarily even grounds for a challenge for cause. Bias sufficient to disqualify a juror requires that the opinion influence the juror in returning a verdict in the case.

Allmon v. Texas Electric Service Co., 242 S. W. 2d 806, Texas Court of Civil Appeals. A juror made the following statement:

> "I would like to see the man get something, as he is disabled for life, and personally, I would like to see him get something; but if we would award him anything the damn lawyers would get it all, anyway."

This statement was made by the juror outside of the jury room, after the case had been submitted to the jury. Appellant contended the statement showed prejudice against his lawyers. On the Motion for New Trial, the juror denied that such statement truly reflected his feelings or sentiments. Before he was taken on the jury he had stated under oath that he was free from bias and prejudice. The court in passing on this stated:

> "There must be, we think, a finding attributable to the trial judge in overruling the Motion for a New Trial that the juror was fair and impartial."

The court went on further to say that in its opinion that the finding of the Trial Court that disqualifying bias or prejudice did not exist is binding upon the Appellate Court.

The case of *Morrow v. Flores, 225 S. W. 2d 621, Court of Civil Appeals (Writ of Error refused, no reversible error)*, was a case where a man on the jury panel lived in the neighborhood where many of the witnesses in the case lived; the man was acquainted with the plaintiff and a number of the witnesses. He had heard something of a shooting which was the subject-matter of the case. The Court held that the objection to this juror was properly overruled when the juror stated that his acquaintance with the parties and his general knowledge of the shooting would not influence his verdict.

In the case of *Murphy v. State, 141 S. W. 2d 634*, by the Texas Court of Criminal Appeals, a negro was being tried for rape. A juror admitted that he had read the head-

lines of the newspaper relative to the rape of the prosecuting witness, he had probably formed an opinion that the crime of rape had been committed, he had heard the case discussed and that after the defendant had been apprehended he had heard some people say that the officers had gotten the right negro. He stated that he had formed the opinion that the officers in arresting the appellant had gotten the right man, but he also stated that he had formed no opinion that the appellant was guilty, and that he would require the State to prove appellant was guilty, beyond a reasonable doubt, and he would presume appellant was innocent until such proof was made. The court here held that the juror was qualified.

The Federal Courts have followed much the same rule in holding a juror who had formed an opinion but who would disregard it and be governed by the evidence was qualified. *Green v. U S., 19 Fed. 2d 93; Kelly v. Gulf Oil Corporation, 28 F. S. 205, confirmed, 90 L. Ed. 1575.* In this latter case the physician who was defendant's medical witness was also the doctor of a juror sitting on the case. The court held that such juror was not disqualified because of acquaintance or even a professional relationship. See also: *Anderson v. Todd Ship Yard, 63 F. S. 229.*

The most recent case of importance decided by the federal courts, bearing upon this issue, is the case of the *United States v. Dennis, 183 Fed. 2d 201 (Certiorari denied), 342 U. S. 842, 96 L. Ed. 636, 72 S. C. 20.* This is the famous Communist Trial. Prior to his selection a man named Jan-

ney, selected as one of the jurors, had made a speech in which he had said:

> "We are already fighting a war with Communism, and it should be a fight to the death; we are in a war, whether we think we are, or not."

and during the trial of the case Janney made many references to the fact that he was violently and interminably tired of talk and documents about Marxism and Leninism; that he would crown or kick anyone who brought up the subject again. The Court there stated that by no means showed the juror could not throw aside his general predisposition with reference to Communism when he was faced with a specific issue in the case, and that a provisional opinion does not disqualify a juror who believes that he can rid himself of such opinion after he has heard the evidence and under that rule the juror was not disqualified. Even though he violated the directions of the court by talking about his weariness and by expressing hostility for Communism, the Trial Court did not abuse its discretion in refusing to discharge him. The court held that the juror showed he was acutely aware of the difference between Communism to which he was hostile, and the particular charge upon which he was to pass.

It is submitted that the petitioner, Mrs. Cagle, has wholly failed to show any bias or prejudice in favor of Gulf Oil Corporation or McQueen & Stout, or to show any bias or prejudice against her in connection with the juror complained about in this case. *Sub-section 4 of Article 2134, Revised Civil Statutes of Texas, 1925*, sets out that a per-

son is disqualified who has a bias or prejudice in favor of or against either of the *parties*. Petitioner has not shown bias or prejudice. All that she has shown is that one juror had heard something about her attorney and his tactics. He did not approve of them. On voir dire the juror testified that he could be fair and impartial and could and would decide the case on the law and on the evidence presented during the trial. It is submitted that this case was decided on the law and on the evidence.

POINT TWO

The cases cited by petitioner are not in conflict with the Circuit Court of Appeals' opinion here attacked.

Petitioner places much emphasis on the case of *Rhodes v. E. P. & S. W. Ry. Co., 248 S. W. 1064*. On that case there was a juror who expressed himself as being opposed to damage suits on contingent fees and during jury deliberation, he argued that he wanted to stop that sort of business. The case of *Smith v. Allbright*, cited by the petitioner, was overruled and reversed by the Commission of Appeals of the State of Texas in its opinion in *5 S. W. 2d 970*. In the case of *Quill v. Southern Pacific Company, 140 Cal. 263, 73 Pac. 991*, a juror stated that he had a prejudice against suits to recover damages for personal injury, stating that he believed they were being brought without merit and that the number was constantly increasing. Such does not apply in this case, nor does the situation set out in *Fitch v. Southern Pacific Company, 149 Cal. 310, 86 Pac. 710*, cited by petitioner. In the case of *Texas Employers' Insurance*

Association v. Wade, 197 S. W. 2d 203, cited by petitioner, the juror was asked on voir dire whether he or any of his close relatives had ever been a plaintiff in a damage suit or had had a claim for workman's compensation benefits. He was asked if he had been involved in any industrial accident or other accident, had made any claim for workmen's compensation benefits or had been paid any sums of money for workmen's compensation benefits. The juror in that case made no reply to such questions when in truth and in fact he had, prior to the time when the questions were asked, had three workmen's compensation claims. In that case the juror withheld from counsel information the counsel was entitled to have. In that case the counsel was deliberately deceived by the failure of the juror to answer up in reply to the question. The cases cited in the *Wade* case are situations where the juror failed to disclose his relationship to one of the parties, where one of the jurors failed to reveal that he had a preconceived idea as to the rights of the parties, or whether the juror had business relations with one of the parties and remained silent when asked concerning the same, thereby misleading or deceiving one of the counsel. In the case of *Kennard v. Kennard, 26 S. W. 2d 336*, cited by petitioner, one of the jurors volunteered information and statements in the jury room, showing a prejudice against one of the parties. This case was decided under the old rules of the State of Texas which required a reversal for misconduct, *unless no probable* injury was occasioned. The present rules in Texas, as set out by *Texas Rules of Civil Procedure, Rule No. 327*, require a showing of *probable injury done;* therefore, the rule as laid down

in *Kennard v. Kennard* no longer applies in Texas. In the case of *Texas Mutual Life Insurance Association v. Morris, 55 S. W. 2d 146*, cited by the petitioner, we are confronted with the situation where a man on the jury, in the jury room, stated that the President of the corporation party to the lawsuit was a crook. In the case of *El Paso Electric Company v. Gambrell, 292 S. W. 2d 577*, cited by the petitioner, is a case where one of the jurors stated that he had sustained a similar injury and he knew all about the pain and suffering gone through by the plaintiff in the Trial Court. This amounted to giving the jury new evidence, which was not presented in court and which was unsworn testimony.

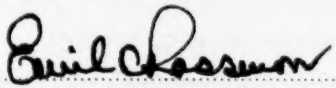
It is submitted that all the cases cited by the petitioner involve situations where there was a hearing on misconduct of the jury or of a juror in the jury-room, or during the course of the trial. It is submitted that the fact situations in the cases cited by petitioner do not apply in the case before this court. In this case we have no showing whatsoever of any bias, and there is no showing of any misconduct of any character during the deliberation of the jury or during the conduct of the trial. It is further submitted that the rule laid down in the case of *McDonald v. Pless, 238 U. S. 264, 35 S. W. 2d 783, 59 L. Ed. 1300*, applies in this case. This is an attempt on the part of the petitioner to impeach the verdict of the jury by use of the affidavit. It is submitted that the affidavit fails to show that Mr. Danielson was not competent to serve as a juror, nor does it disclose anything improper on his part in determining

the fact issues which were submitted for jury determination.

PRAYER

WHEREFORE, respondents McQueen & Stout and Gulf Oil Corporation pray that the Writ of Certiorari sought here will be in all things denied.

Respectfully submitted,



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